incompatible with the Sixth Amendment, as interpreted by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and subsequent cases. *See United States v. Shepard*, 125 S.Ct. 1254 (2005); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002).

STATEMENT OF THE CASE

1. On July 11, 1989, FBI surveillance agents observed a black male driving a red car deliver a box to June's Car Wash in Detroit, Michigan, but the driver got away. The FBI searched the car wash, seized 32 kilograms of cocaine, and arrested a number of car wash employees. Months later, the FBI arrested Smith and accused him of being the driver.

2. On August 17, 1990, a federal grand jury returned an indictment charging Smith and thirteen others with various narcotics offenses. Smith was charged in five counts, including conspiracy, possession with intent to distribute, interstate travel to commit a drug offense, and use of a telephone to facilitate a drug offense. Prior to trial, the government filed a Superseding Information, pursuant to 21 U.S.C. §841 and §851, noticing its intent to seek an enhanced mandatory minimum sentence against Smith based on a prior 1980 conviction for possession with intent to distribute diet pills.

3. The sole issue in dispute at trial was identification. The government presented evidence of recorded conversations in which Smith was identified as "Pops Bishop," the speaker on a series of coded telephone conversations with the owner of the car wash in the hours and minutes leading up to the arrival of the red car. The government also presented records of money wire transfers between the car wash owners and Smith.

There was no forensic evidence linking Smith to the cocaine. Moreover, not one witness at trial positively identified Smith as the driver. One witness described the driver as a short brown-skinned black man in his 30s to 40s, with a beard.[1] Another witness described the driver as a black male in his late 30s or early 40s. One FBI agent described the driver as a "dark-skinned" black male. Another FBI agent could not recognize the driver "only to say that it was a black male ... driving it."

Carlos Clark, a twenty-year old car wash employee, testified as a government witness that he could not point out the driver, that he "[doesn't] remember his face right now," that he "didn't get a good look at his face," that he thought the name of the driver "might have been Pops," and that the driver "looked like he might have been about in his thirties or forties." Clark testified that he had heard the name "Bishop" at the car wash because "Bishop" called the car wash one day, but he had never heard the name "Pops Bishop."

The government sought to impeach Clark, its own witness, with the testimony he had previously given to the grand jury. Clark acknowledged that he had told the grand jury that he had previously seen the driver, but explained that he simply meant that the driver looked familiar. Clark acknowledged telling the grand jury that he ***thought*** the driver's nickname was "Pops." Clark denied telling the grand jury that the individual who backed the red car into the car wash was "Pops Bishop." Clark accused the prosecutor: "You're putting two people's names together. I did not say Pops Bishop."

Thereafter, over defense objection, the government sought to admit excerpts of Clark's grand jury testimony,

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[1] Smith is a light-skinned black male who, on the date of delivery, was 52 years old.

wherein Clark testified that the person named "Pops Bishop" was the driver of the red car. The prosecutor argued that the grand jury testimony was admissible as a prior inconsistent statement and was "essential to the government's case against Marvin Smith." The district court allowed the case agent to read an excerpt of Clark's grand jury testimony. The district court also permitted the government to introduce a transcript of Clark's grand jury testimony as a government exhibit, over defense objection. Smith argued that the court was unfairly emphasizing the testimony by admitting the transcript because the government had already cross-examined Clark with the grand jury testimony. The district court then permitted the defense to recall Clark for additional cross-examination. Clark was asked to look at the defendants in court and testify whether he could identify the driver of the red car. Clark testified that he did not see the person in court. Clark further testified that he had never identified an individual by the name of Marvin Smith as the person who drove the red car on July 11, 1989.

4. Smith did not testify or present any evidence. During his opening and rebuttal summation, the prosecutor urged the jury to review the transcript of Clark's grand jury testimony as proof that Smith was the driver of the red car. Smith's counsel, by contrast, argued that no one positively identified Smith in court as the driver of the red car, and that the eyewitness description of the driver as a dark-skinned black male in his 30s or 40s did not match Smith, who was a 52 year old light-skinned black male.

5. The district court instructed the jury that it could consider the grand jury testimony of Carlos Clark, "not only for impeachment purposes, but that testimony may be considered by you as evidence on which you base your verdict." Within twenty minutes of commencing their deliberations, the jury requested the transcript of Clark's grand jury testimony. The district court gave the jury that transcript without a cautionary

instruction regarding the proper use of that transcript. *Id.* at 10a-11a. On September 8, 1991, Smith failed to appear for court, and the jury thereafter found him guilty of all counts.

6. On March 29, 2004, after Smith was apprehended, the district court imposed sentence. After enhancing Smith's offense level for the quantity of cocaine and obstruction of justice, neither of which was found by the jury, the district court determined that Smith's guidelines range was 210-262 months. However, the district court was constrained to impose an enhanced mandatory minimum term of 240 months under 21 U.S.C. §841 and §851 based on a prior 1980 conviction in Texas for possession with intent to distribute diet pills. That prior 1980 conviction had neither been alleged in the indictment nor submitted to the jury as an element of the offense. Thus, Smith was sentenced to 240 months.

7. On appeal Smith argued that the district court erred by providing the deliberating jury with the transcript of Clark's grand jury testimony without any cautionary instructions, and by providing the deliberating jury with a copy of the indictment without instructing them that the indictment is not evidence of guilt. Smith also argued that his sentence should not have been enhanced based on facts not found by the jury, but recognized that his challenge to the increased mandatory minimum was foreclosed by this Court's decision in *Almendarez-Torres*. In response, the government argued that Smith's appeal should be dismissed on the basis of the fugitive disentitlement doctrine and that, in any event, the district court did not commit any trial errors. Importantly, the government did not argue that any trial errors were harmless.

The Sixth Circuit affirmed Petitioner's conviction. After first rejecting the government's argument that the fugitive disentitlement doctrine required automatic dismissal of Smith's appeal, App. 6a-8a, the Court of Appeals held that the district

court erred by failing to give a proper "cautionary instruction before providing the petit jury with a transcript of Clark's grand jury testimony," and by failing to explain its decision to admit the transcript. *Id.* at 8a-10a. However, notwithstanding the government's failure to argue harmless error, the Sixth Circuit held that the trial errors were harmless. The Sixth Circuit reasoned that there was substantial additional evidence at trial upon which the jury could have based a guilty verdict. *Id.* at 11a-13a.

The Sixth Circuit also held that the district court committed a constitutional error under *Booker* by enhancing Smith's offense level based on facts not found by the jury. *Id.* at 17a. Although the Court of Appeals "would normally have to remand Smith's case for resentencing," it held that remand was unnecessary because Smith was sentenced to the enhanced mandatory minimum of twenty years and, therefore, the district court would have no discretion to impose a lower sentence on remand. *Id.* Thus, the prior conviction, which like the guidelines enhancements was not alleged in the indictment or submitted to the jury, raised Smith's mandatory minimum from ten to twenty years.

8. Smith filed a timely petition for rehearing, arguing that the Sixth Circuit panel should not have engaged in harmless error review because the government had not argued that any errors were harmless. The petition for rehearing was denied on September 6, 2005. *Id.* at 18a.

REASONS FOR GRANTING THE WRIT

I. The Court Should Clarify Whether the Government Waives Harmless Error Review of Preserved Trial Errors by Failing to Argue Harmlessness on Appeal

The harmless error standard for preserved trial errors is

set forth in Federal Rule of Criminal Procedure 52(a), which provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." In at least three cases over the past 12 years, this Court has made it clear that in a federal criminal case the government carries the burden to show that a preserved trial error was harmless. *See United States v. Vonn*, 535 U.S. 55, 62 (2002) (noting that ***the government*** must "carry the burden of showing that any error was harmless, as having ***no effect*** on the defendant's substantial rights.") (emphasis added); *O'Neal v. McAninch*, 513 U.S. 432, 437-41 (1995) (noting the common-law rule which put the burden on the "beneficiary of the error" to prove the absence of injury); *United States v. Olano*, 507 U.S. 725, 734 (1993) (distinguishing "harmless error" under Rule 52(a) from "plain error" under Rule 52(b) on the basis that the government carries the burden).

This Court has never squarely addressed whether, in view of the government's burden, the government necessarily waives harmless error review by failing to raise harmlessness on appeal. The appellate courts that have considered the issue have concluded that although harmless error review may be waived, the appellate courts are not bound by such waivers and may *sua sponte* conduct such review. *See United States v. Gonzalez-Flores*, 418 F.3d 1093 (9th Cir. 2005); *United States v. Torrez-Ortega*, 184 F.3d 1128 (10th Cir. 1999); *United States v. McLaughlin*, 126 F.3d 130 (3d Cir. 1997), *cert. denied*, 524 U.S. 951 (1998); *United States v. Rose*, 104 F.3d 1408 (1st Cir.), *cert. denied*, 520 U.S. 1258 (1997); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n. 10 (11th Cir.), *cert. denied*, 516 U.S. 960 (1995); *United States v. Pryce*, 938 F.2d 1343 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 941 (1992); *United States v. Giovannetti*, 928 F.2d 225, 226 (7th Cir. 1991). That is, the appellate courts have held that they may overlook the government's failure to argue harmlessness.

At least two federal appellate judges have, in dissenting opinions, forcefully argued that the doctrine of waiver, which is applied so stringently to a defendant who fails to raise an issue on appeal, must apply equally to the government under these circumstances. *See United States v. Pryce*, 938 F.2d 1343, 1352-55 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 941 (1992) (Silberman, J., dissenting); *Lufkins v. Leapley*, 965 F.2d 1477, 1484-87 (8th Cir.), *cert. denied*, 506 U.S. 895 (1992) (Heaney, J., dissenting). In *Pryce*, Judge Silberman reasoned that, because the government bears the burden of persuasion, the government waives the issue of harmlessness when it fails to mention the issue at all. Judge Silberman explained:

> The government's failure (or refusal for reasons not apparent) to argue harmless error puts the judiciary's neutrality at issue because another related tenet of our system of justice is that we "recognize[ ] an adversary system as the proper method of determining guilt." *Singer v. United States,* 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630 (1965). And "[t]he premise of [that] adversarial system is that appellate courts do not sit as self-directed boards of inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983). We thus ordinarily have no right to consider issues not raised by a party in either briefing or argument, both because our system assumes and depends upon the assistance of counsel, *see id.*, and because of the unfairness of such a practice to the other party, *see, e.g., McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208, 1210 (D.C.Cir.1986).
>
> Applying these principles to the present case, I do not believe we may consider whether the grave error appellant's counsel presses upon us was harmless. As

> the government did not argue that the harmless error exception applies, "respect for the adversary process makes it inappropriate to address [harmless error] at all." *In re Barr Laboratories*, 930 F.2d 72 (D.C.Cir.), *cert. denied*, 502 U.S. 906 (1991).
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> * * *
>
> And it simply cannot be, as Judge Randolph suggests, that the government may not waive harmless error because it possesses no "rights" regarding harmless error. Unlike defendants, the government in criminal cases almost never possesses a "right" with respect to any issue, yet it may still waive them. *See, e.g., United States v. Malin*, 908 F.2d 163, 167 (7th Cir.), *cert. denied*, 498 U.S. 991, 111 S.Ct. 534, 112 L.Ed.2d 544 (1990) (government did not argue on appeal and therefore waived the argument that the defendant failed to preserve an objection to jury instructions). And, after all, the government might honestly believe that if the trial judge's conduct was erroneous, the error had an impact on the trial. If that were so (and we cannot really be certain that is not true here), we would not expect the government to argue harmless error. If the government refuses to argue the point (as it did here), I do not see how the court can *sua sponte* raise the issue without encroaching into the executive branch's prosecutorial prerogatives...

Pryce, 938 F.2d at 1352-54 (Silberman, J., dissenting).

Significantly, although the appellate courts agree that they have the discretion to ignore a government waiver of harmlessness, the courts have not all agreed on the different factors that should guide the exercise of that discretion or the weight to give to those factors. The Seventh Circuit in

Giovannetti was the first to identify any "controlling considerations," namely: 1) the length and complexity of the record, 2) whether the harmlessness of the error or errors found is certain or debatable, and 3) whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court. 928 F.2d at 227.[2] Ironically, although the Seventh Circuit is credited with being the first court to articulate a test, the Court of Appeals in that case refused to consider the harmless error issue because "[t]he certainty of harmlessness does not appear with such clarity from an unguided search of the record that we should raise the issue on our own motion." *Id.*

In his dissent in *Pryce*, only four months later, Judge Silberman took issue with the Seventh Circuit's cost-based approach.

> I hold that view because to adopt the *Giovannetti* rule is to put an aberrant twist on the adversary model. To be sure, the model is probably not the most cost-effective method of finding truth or ascribing guilt or innocence, but it hardly needs repeating that it is a fundamental aspect of our legal tradition which judges have no warrant to disregard. However sensitive to the costs and benefits of the legal process we should be in understanding the legal rules we apply, it is hard for me to see how efficiency concerns can be the source of our power...
>
> It is difficult, moreover, to see a principled stopping place to Judge Williams' balancing test. Should we be

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[2] The *Giovannetti* court originally held that the government waives harmless error when it fails to raise the issue. *See United States v. Giovannetti*, 919 F.2d 1223, 1229 (7th Cir.1990).

> willing to overlook counsel's failure to raise a clearly winning argument-even in civil cases-if by doing so we can save the expense of a new trial (or other societal costs)? Or is this a rule for criminal cases only? And if it is the latter, is that because the courts have some unstated responsibility to help the government in its prosecution of defendants? I think not-we have only the duty to apply the law neutrally in both criminal and civil cases...
>
> When judges think of themselves as bearing responsibility for the results dictated by a neutral application of the law, whether in the civil or criminal field, they tend to exceed appropriate bounds of judicial restraint. By compromising its neutrality, I think the court does so here. That "cost" far exceeds the costs of a new trial for Pryce and Antonio.

Pryce, 938 F.2d at 1355. (Silberman, J., dissenting).

Thereafter, other appellate courts and individual judges have both endorsed and criticized the *Giovannetti* factors to varying degrees. *Compare Gonzalez-Flores*, 418 F.3d at 1101 ("[W]e believe that while all three *Giovannetti* factors are relevant to a court's determination of whether to engage in harmless-error review on its own initiative, the second factor-the court's certainty as to the harmlessness of the error-is of particular importance."); *Torrez-Ortega*, 184 F.3d at 1136 n.7 (finding *Giovannetti* factors useful without deciding whether they are exhaustive); *with Rose*, 104 F.3d at 1415 ("While we find helpful the reasoning of the Seventh Circuit, we do not restrict ourselves to the *Giovannetti* test....The exercise of discretion involves the balancing of many elements. Among these are the state of the record and whether the arguments that the government does make provide assistance to the court on the harmlessness issue."); *United States v. Samaniego*, 187 F.3d

1222, 1225 n.2 (10th Cir. 1999) (doubting that the ***third*** *Giovannetti* factor adds anything to the analysis); *id.* at 1227 (Tacha, J., dissenting) (doubting the utility of the ***first*** *Giovannetti* factor); *Pryce*, 938 F.2d at 1348 n.4 (Williams, J., separate opinion) (citing *Giovannetti* favorably but stating that "[t]he role of the third factor is unclear); *McLaughlin*, 126 F.3d at 135 (even though reversal would be "costly," the complexity of the record and the uncertainty of the harm warranted vacating conviction).

Whether the appellate courts should be bound by the government's waiver of harmlessness on appeal is an issue of exceptional importance to the administration of justice and the appearance of justice. Appellate courts do not hesitate to find a binding waiver when a criminal defendant fails to raise an issue on direct appeal, even when the issue was foreclosed by governing case law at the time the appellant's initial brief was filed. *See, e.g., United States v. Vanorden*, 414 F.3d 1321, 1323 (11th Cir. 2005) (finding waiver of *Booker* issue for failure to raise it in initial brief filed before *Booker* was even decided). The government's failure to argue harmlessness is invariably either by design or neglect, neither of which justifies an appellate court coming to the government's rescue.

In its decision below, the Sixth Circuit found harmless error even though the government failed to argue harmlessness in its brief on appeal. Thus, Smith's first opportunity to address harmlessness was on petition for rehearing, after the Court of Appeals decided the appeal on the basis that the multiple errors were harmless. As the Ninth Circuit recently observed, the practice of *sua sponte* finding harmless error "may unfairly tilt the scales of justice by authorizing courts to construct the government's best arguments for it without providing the defendant with a chance to respond." *Gonzalez-Flores*, 418 F.3d at 1101.

Here, the Sixth Circuit denied the petition for rehearing without explanation of the factors it considered in *sua sponte* overlooking the government's waiver. The absence of a written discussion, however, should not foreclose certiorari review. By its very nature, the issue of government waiver would generate a published discussion, if at all, only on a petition for rehearing, *see Giovannetti*, *supra*, or when there is dissension within the appellate panel. *See, e.g., Pryce, supra*; *Lufkins, supra*. This Court should grant certiorari to clarify when, if ever, an appellate court may overlook a government waiver and find a preserved trial error harmless.

II. *Almendarez-Torres* Should Be Overruled Because It Is Incompatible With The Sixth Amendment

In *Almendarez-Torres v. United States*, a 5-4 majority of the Court held that the sentence to which a defendant is exposed may constitutionally be increased on the basis of prior convictions that were not alleged in the indictment. 523 U.S. at 239-47. That case involved the interpretation of 8 U.S.C. § 1326, which authorizes increased punishment for an alien who enters the United States after removal following "conviction for commission of an aggravated felony." 8 U.S.C. § 1326(b)(2). The four dissenters in *Almendarez-Torres* suggested that "it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject." *Id.* at 251.

In *Jones v. United States,* the Court began to reverse course. The Court considered whether 18 U.S.C. § 2119, the federal carjacking statute, "define[s] three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict." 526 U.S. 227, 229

(1999). The Court concluded that the statute created three separate offenses. *Id.* Its analysis rested in large measure upon the conclusion that constitutional doubt would indeed be raised by "judicial factfinding by a preponderance [that] support[s] the application of a provision that increases the potential severity of the penalty for a variant of a given crime." *Id.* at 242-43.

The following term, the Court in *Apprendi v. New Jersey* struck down a New Jersey statute that increased sentences upon a judicial finding that a crime was committed with a racially biased purpose. 530 U.S. at 490. Because *Almendarez-Torres* was logically inconsistent with the rule it was announcing, the Court carved out a special exception to *Apprendi* when "the fact of a prior conviction" is at issue. However, the Court observed that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* at 489-90 (footnote omitted). Indeed, there appears to be no principled purpose for excepting the fact of a prior conviction from the Sixth Amendment right to trial by jury.

In a concurring opinion, Justice Thomas, who was one of the five Justices in the *Almendarez-Torres* majority, wrote that *Almendarez-Torres* had been wrongly decided. Justice Thomas explained that "every fact that is by law a basis for imposing or increasing punishment" must be indicted and proved to a jury beyond a reasonable doubt, *id.* at 501, and "the fact of a prior conviction is an element under a recidivism statute." *Id.* at 521. Thus, a majority of the current Court believes that *Almendarez-Torres* was wrongly decided. *See Shepard*, 125 S.Ct. 1254, 1264 (Thomas, J., concurring in part) ("*Almendarez-Torres* ... has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").

A judge's authority to sentence derives wholly from the jury's verdict. *Blakely*, 542 U.S. at 304-05. Judicial determination of *any* fact that increases the punishment to which a defendant is exposed violates this principle. *Id.*; *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt"). The fact of prior conviction is logically indistinguishable from any other "fact" within the meaning of *Apprendi*. When a judge finds a fact in order to increase a defendant's exposure to punishment, the judge exercises the power to impose a sentence that is not authorized by the jury.

Plainly, the recidivism exception announced in *Almendarez-Torres* is an anomaly. This case is an ideal vehicle to correct the anomaly. First, the case involves a statute, 21 U.S.C. § 841, that like the statute in *Almendarez-Torres*, provides for different penalties within the text of the statute, depending on whether a particular factor is satisfied. In particular, §841(b)(1)(A) increases the mandatory minimum for a drug offense involving 5 or more kilograms of cocaine from ten years to twenty years if the offender commits the violation "after a prior conviction for a felony drug offense has become final..."

Second, the fact that §841 provides for an enhanced minimum rather than an enhanced maximum actually makes it more attractive for reconsidering *Almendarez-Torres* because in the majority of drug cases, the increased mandatory minimum (from 10 to 20 years, for example) will exceed the guidelines. Thus, in drug cases which require mandatory minimums, a judicial finding of a prior conviction will almost invariably increase a defendant's sentence beyond the guideline range and,

unlike cases involving increased statutory maxima in the post-*Booker* era, will constrain a sentencing judge from sentencing below the guideline range. Third, the opinion below makes clear that, absent the increased mandatory minimum, the case would have been remanded for resentencing. Finally, that this case does not stem from a conflict among the courts of appeals is not significant because no such conflict will ever arise. Until this Court overrules *Almendarez-Torres*, the lower courts are bound to follow it.

The Court's decision in *Almendarez-Torres* is incompatible with the Sixth Amendment values expressed in *Apprendi* and subsequent cases. For the foregoing reasons, this is the "appropriate case" in which to "consider *Almendarez-Torres*' continuing viability." *Shepard*, 125 S.Ct. at 1264 (Thomas, J., concurring in part).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 04-1476

MARVIN SMITH,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 90-80445 – Patrick J. Duggan, District Judge

Argued: July 22, 2005

Decided and Filed: August 18, 2005

Before: KENNEDY, CLAY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Scott A. Srebnick, Miami, Florida, for Appellant. Robert Cares, UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee. **ON BRIEF**: Scott A. Srebnick, Miami, Florida, for Appellant. Robert Cares, UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

OPINION

RONALD LEE GILMAN, Circuit Judge. Marvin Smith, the delivery man for a drug-trafficking ring operating out of a Detroit car wash, was indicted in 1990 on charges that he conspired to possess and did possess 32 kilograms of powder cocaine with the intent to distribute, engaged in interstate travel in aid of racketeering, and unlawfully used a communication device. Shortly before the jury convicted Smith on all counts, he absconded. He was not apprehended until 12 years later. The district court, in 2004, sentenced him to 240 months in prison.

On appeal, Smith argues that the district court erred in (1) admitting into evidence the grand jury testimony of an important prosecution witness and then providing the transcript to the petit jury in the absence of a cautionary instruction, (2) reading the indictment against Smith to the jury and then sending it to the jury room without a proper limiting instruction, and (3) enhancing Smith's sentence on the basis of judge-found facts in violation of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005). For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. The drug-trafficking operation

Agents from the Federal Bureau of Investigation (FBI) raided June's Car Wash in Detroit, Michigan on the evening of July 11, 1989 and seized 32 kilograms of high-quality powder cocaine. The evidence that led to this investigation was

primarily obtained through FBI wiretaps on three telephone lines. Two of the telephone lines were located at the car wash and the other was located at the home of Joseph Moss, one of the car wash's co-owners.

Calls that were intercepted on these lines in June of 1989 alerted FBI agents to the fact that a man in California, referred to alternatively as "Pops," "Bishop," and "Pops Bishop," was trying to make a large purchase of cocaine that he planned to deliver to the car wash. Smith admitted in a 1990 interview with an FBI agent that he had "used the name Bishop all his life," and "that people call him Pops." Furthermore, a voice exemplar taken from Smith matched the voice of the man in these intercepted calls.

During one of the June telephone conversations between Smith and Roosevelt Lockett, the other co-owner of the car wash, Smith advised that "whatever move I make right now is gonna be damn near big enough to hold us the summer." Lockett said to Smith, in a conversation later that day: "I'm sending you the seven." Moss sent a money order in the amount of $7,000 to California less than three hours later. It was payable to "Marvin Smith."

A month after this, another series of conversations intercepted on the phone lines suggested to agents that the car wash was expecting a large quantity of cocaine to be delivered in the near future. On July 10, 1989, Patricia McKenzie, also a member of the drug-trafficking ring, assured Moss that Smith would soon be making a delivery. McKenzie told Moss: "Okay. I talked to Pops and he called me twice yesterday . . . [and] he said it might be today." The next day, on July 11, 1989, Smith called Moss and advised him that "the front man's here so we talkin' about between three and six." At approximately 6:00 p.m., Smith called Moss at the car wash and asked, "Anybody in my parkin' spot?" Moss replied, "No." And Smith told him

to "leave the door open."

FBI agents conducting surveillance on the car wash saw a red car arrive and then back into the wash bay nearest the office. Unlike the other cars that the agents had seen entering the bays, this car was not washed. (Three of the young men who were working at the car wash that day later testified that Moss had instructed them not to wash this particular car.) After backing the car in, the driver got out and opened the trunk. Moss and others were then seen taking boxes out of the trunk and carrying them to the office. As soon as the unloading was finished, the driver got back in the red car and drove away from the car wash. The car was followed by FBI agents, who obtained its license number, but never stopped the car. (In its brief, the government suggests that this was because the agents "were unable to stop it," but we find no support for this statement in the record.) A few minutes after the red car left the car wash, FBI agents executed a search warrant on the premises and discovered 32 kilograms of high-quality powder cocaine in the office.

B. Proceedings in the district court

Fourteen people were charged in connection with the drug-trafficking ring operating out of the car wash. Smith was indicted on five counts: conspiracy to possess powder cocaine with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846; possession of 32 kilograms of powder cocaine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1); engaging in interstate travel with the intent to carry on an unlawful activity, in violation of 18 U.S.C. § 1952; and two counts of unlawful use of a communication device, in violation of 21 U.S.C. § 843(b).

In January and February of 1991, Smith was tried along with 11 of his codefendants. The government alleged that Smith

was "Pops Bishop," the man who had helped to orchestrate the cocaine purchase and who had driven the red car that delivered the cocaine to the car wash. None of the FBI agents conducting surveillance of the car wash, however, was able to identify Smith as the driver of the car that made the delivery. Three car wash employees who were working on the day of the delivery testified for the prosecution at trial, but they also failed to identify Smith as the driver of the red car. One employee, Carlos Clark, reluctantly admitted that the name of the driver "might have been Pops," and that he "remember[ed] the name." But Clark then insisted that he had never heard the name "Pops Bishop" at the car wash, and said that he could not identify Smith as the driver of the red car.

Because Clark's trial testimony differed from the testimony that he had previously given to the grand jury that indicted Smith, the government was permitted to read Clark's grand jury testimony into the record. *See* Fed.R.Evid. 801(d)(1)(A). The grand jury testimony, in relevant part, reads as follows:

Q: Now, did you recognize the driver of the car?
A: Yes.
Q: Had you seen the driver before?
A: Yes, I saw him before.
Q: Did you know his name?
A: No.
Q: Did you know him by a nickname?
A: I think I heard of his nickname.
Q: What was his nickname?
Q: A: I think it's Pops.
Q: Pops?
A: Yes.

. . .

Q: He had been to the car wash before? You'd seen him there before?

A: Right.

. . .

Q: Did you ever hear of a person by the name of Pops Bishop?

A: I think that's him.

Q: He was in the red car . . ., is that right?

A: Right.

In addition to reading this testimony into the record, the district court permitted the government to introduce a transcript of Clark's grand jury testimony as an exhibit. Later, the jury was permitted to view this exhibit during its deliberations.

Smith failed to appear for court on February 6, 1991, which was after the jury had begun its deliberations but two days before it found him guilty on all five counts. He remained a fugitive for 12 years. Smith was finally apprehended in Mexico in March of 2003. In 2004, the district court sentenced Smith to 240 months in prison. This timely appeal followed.

II. ANALYSIS

A. The fugitive disentitlement doctrine

This case presents the difficult question of whether we should employ the fugitive disentitlement doctrine to dismiss Smith's appeal from his conviction. Courts have used this doctrine to dismiss the appeals of defendants whose flights "operate[] as an affront to the dignity of the court's proceedings" or "so delay the onset of appellate proceedings that the Government would be prejudiced in locating witnesses and presenting evidence at retrial after a successful appeal." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 246, 249 (1993). The government argues that Smith's appeal from his conviction should be dismissed because his 12-year flight from justice has prejudiced the government's ability to retry him in the event that

we set aside his 1991 conviction.

A review of the caselaw reveals that this court and courts in many of our sister circuits have applied the doctrine in circumstances similar to the present appeal. *See, e.g., United States v. Genoa*, No. 93-2292, 1995 WL 73291, at *4 (6th Cir. Feb. 22, 1995) (unpublished) (dismissing the appeal of a defendant who was a fugitive for three years because his appeal could not be consolidated with his codefendants' appeals, "constitut[ing] a significant interference with the substantial interests of the appellate process"); *United States v. Sudthisa-Ard*, 17 F.3d 1205 (9th Cir. 1994) (applying the doctrine to dismiss the appeal of a defendant who had been a fugitive for thirteen years); *United States v. Bravo*, 10 F.3d 79 (2d Cir. 1993) (dismissing the appeal of a defendant who was a fugitive for fifteen years).

All of the above case, however, were decided prior to the Supreme Court's ruling in *United States v. Degen*, 517 U.S. 820 (1996). In *Degen*, the Supreme Court refused to apply the disentitlement doctrine, "counsel[ing] restraint in resorting" to "harsh sanction of absolute disentitlement." *Id.* at 823, 827. It further warned that "the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked" because the respect accorded to a court's judgment "is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits." *Id.* at 828.

The Supreme Court's admonition was heeded by this court in two post-*Degen* cases where the government sought to invoke the fugitive disentitlement doctrine. One of the cases is *Brown v. O'Dea*, 187 F.3d 572 (6th Cir. 1999), where the court reached the merits of the defendant's claims on appeal despite his being a fugitive for more than ten years. Judge Moore explained in her concurring opinion that refusing to apply the fugitive disentitlement doctrine was appropriate "[i]n light of

the Supreme Court's recent warnings against using our inherent power to control our docket as a tool for inflicting ad hoc punishment." *Id.* at 584 (Moore, J., concurring). The other case is *March v. Levine*, 249 F.3d 462, 470 (6th Cir. 2001), where the court also refused to dismiss a former fugitive's appeal, and it did so in explicit reliance on "the *Degen* Court's guidance to courts in deciding whether to disentitle a claimant."

Nevertheless, the Supreme Court was clear in *Degen* that the dismissal of an appeal pursuant to the fugitive disentitlement doctrine may be appropriate where there is a genuine risk "of delay or frustration" of the government's case against a defendant. 517 U.S. at 825. In the present appeal, the government has alleged that "Smith's absence for twelve years makes it virtually impossible for the government to retry the case." To support this contention, the government states that one of Smith's codefendants has died, the FBI agent who managed the case has retired, "some of the physical evidence may have been destroyed," and "it is probable that not all of the witnesses could even be located."

But these conclusory and hypothetical statements alone are insufficient to trigger "the harsh sanction of absolute disentitlement." *Degen*, 517 U.S. at 827. An evidentiary hearing in the district court would therefore be necessary to determine whether the government would in fact be prejudiced by a retrial of Smith's case. Rather than undergo such a process, however, we can avoid having to deal any further with the government's contention on this issue if we conclude that the district court committed no reversible error during Smith's 1991 trial.

B. Clark's grand jury testimony

1. Admitting the transcript of Clark's testimony as an exhibit

Clark told the grand jury that he recognized the man who delivered the cocaine as "Pops Bishop," but, when he was called to testify at Smith's trial, Clark denied any such knowledge. He instead insisted that he had never heard the name "Pops Bishop" at the car wash and could not identify Smith as the driver of the red car. Under such circumstances, the admission of Clark's grand jury testimony was appropriate. *See United States v. Distler*, 671 F.2d 954, 958 (6th Cir. 1981) (approving of the admission of grand jury testimony after "many of the witnesses forgot portions of their grand jury testimony or remembered it with less certainty of detail").

Smith does not argue that the district court erred in permitting the government to read excerpts of Clark's grand jury testimony to the jury in the present case. Nor does he contend that this testimony may not be considered as substantive evidence of his guilt. Smith does insist, however, that the district court erred in admitting the transcript as an exhibit and thereafter providing a copy of the transcript to the jury. He argues that providing the testimony "in black and white" as an exhibit had the effect of encouraging the jury to place undue weight on the grand jury testimony relative to the other testimony offered at trial. *See United States v. Walker*, 1 F.3d 423, 430 (6th Cir. 1993) ("The potential for double exposure to selected testimony to improperly influence a jury has long been recognized."). Because Smith preserved his objection to the district court's admission of the transcript as an exhibit, we review its actions under the abuse-of-discretion standard. *See United States v. West*, 948 F.2d 1042, 1044 (6th Cir. 1991) (holding that the decision to admit transcripts of taped testimony into evidence, or to send transcripts to the jury for their reference, falls within the sound discretion of the trial court).

If the transcript of Clark's grand jury testimony had been sent to the petit jury after the district court had determined that such action was necessary and after the court had given an

appropriate limiting instruction, there can be little doubt that the district court would not have abused its discretion in permitting the deliberating jury to view the transcript. *See United States v. Scaife*, 749 F.2d 338, 347 (6th Cir. 1984) ("A district court has broad discretion to permit a jury to take to the jury room any tape recordings that have been admitted as exhibits during trial."). Whether the transcript was properly admitted as an exhibit, however, is a closer question.

This court was faced with an analogous situation in *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721 (6th Cir. 1994). There, the court warned that a "party's right to admit prior statements in a document for rehabilitative purposes [does not] necessarily entitle[] that party to submit the document as an exhibit to the jury. Permitting the document to go to the jury room could unduly prejudice the cross-examining party." *Id.* at 730 n.2. The *Engebretsen* court advised that the district court should instead "consider admitting the statements in the document through testimony or by having the document read to the jury." *Id.* Only where "the court determines that admitting the document as an exhibit is necessary" should the document be admitted, and then only with an appropriate instruction regarding "the limited purpose of the exhibit." *Id.*

The district court in the present case offered no justification for its decision to eschew the established practice of simply reading the transcript of the testimony aloud to the jury. It made no finding with regard to whether the admission of the transcript as an exhibit was necessary, nor did the court explain its decision to provide the deliberating jury with a copy of the transcript. The failure of the district court to explain its actions regarding the grand jury transcript was an abuse of discretion. *See Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004) ("At times, we have found an abuse of discretion where a district court fails to explain its reasoning adequately or to consider the competing arguments of the parties.").

Nevertheless, because Smith has failed to show that the jury's consideration of the transcript prejudiced his defense (see Part II.B.2. below), any error by the district court would necessarily be harmless. *See Scaife*, 749 F.2d at 347 (ruling that the district court's "technical error" in permitting the deliberating jury to listen to a tape that had not been admitted into evidence was harmless because "the defendants ha[d] not even attempted to show prejudice").

2. Failing to give the jury a cautionary instruction

Smith also argues that the district court erred in failing to give proper cautionary instruction before providing the deliberating jury with a copy of Clark's grand jury testimony. *See United States v. Rodgers*, 109 F.3d 1138, 1141 (6th Cir. 1997) (taking the "opportunity to explicitly announce the rule that a district court must give cautionary instructions to the jury when allowing the jury to review trial testimony, and [warning that] a failure to do so may be reversible error"). This court has recognized that there are "two inherent dangers" in permitting a jury to review testimony offered at trial during its deliberations. *United States v. Padin*, 787 F.2d 1071, 1076 (6th Cir. 1986). First, the jury may accord "undue emphasis" to the testimony it reviews. *Id.* And second, "the limited testimony that is reviewed may be taken out of context by the jury." *Id.* "[T]hese concerns are escalated after the jury ha[s] reported its inability to arrive at a verdict." *Id.* at 1077.

The reported cases addressing when it is appropriate for a deliberating jury to review testimony do not distinguish between a district court's rereading of trial testimony to the jury and providing the jury with transcripts of the testimony. *Compare United States v. Tines*, 70 F.3d 891, 897 (6th Cir. 1995) (applying the two concerns expressed in *Padin* to the district court's decision to read back testimony), *with Rodgers*,

109 F.3d at 1143 (evaluating, in light of *Padin*, the district court's decision to provide the jury with a transcript of testimony). Smith also argues that transcripts of grand jury testimony should be treated differently than transcripts of trial testimony, but the relevant caselaw with respect to this issue does not support such a distinction. *See Distler*, 671 F.2d at 958-59 (permitting the jury to consider both trial testimony and grand jury testimony as substantive evidence of the defendant's guilt).

The district court's primary error, however, was its failure to issue a cautionary instruction before providing the petit jury with a transcript of Clark's grand jury testimony. Such an instruction is necessary "to guard against the dangers of undue emphasis and context." *Tines*, 70 F.3d at 897 (approving the district court's decision to issue a cautionary instruction "[t]wice before and once after the testimony was re-read"). The district court therefore abused its discretion in failing to give an appropriate instruction with regard to the proper use of Clark's grand jury testimony. *See Rodgers*, 109 F.3d at 1141 (holding that a district court commits error when it does not give a cautionary instruction before permitting a deliberating jury to review testimony).

Setting aside the judgment and remanding for a new trial is required, however, only if Smith can show that he was prejudiced by the district court's error. Smith asserts that the jury's request to see the transcript of Clark's grand jury testimony, in the absence of a similar request to review Clark's trial testimony, demonstrates that the jury place "undue emphasis" on the grand jury testimony. *Padin*, 787 F.2d at 1076. The record reveals, however, that the jury asked to see the grand jury testimony of several witnesses, including that of Clark, just after it began its deliberations. When the court informed the jury that some of the testimony requested did not exist because the witnesses had not all testified before the grand

jury, the jury then asked for all of the exhibits in the case to be sent to the jury room. The jury's blanket request to see all of the exhibits at this early stage of its deliberations can hardly be said to constitute strong evidence that the jury placed undue emphasis on this one exhibit. *See Rodgers*, 109 F.3d at 1144 (concluding that the district court's error in failing to issue a cautionary instruction was harmless where "there [wa]s no indication the jury was having great difficulty agreeing on a unanimous verdict").

Smith further argues that the petit jury necessarily viewed the transcript of Clark's testimony "out of context" because the district court neglected to explain to the jury the ex parte nature of grand jury proceedings. *Id.* at 1143. But the jury in Smith's case had the benefit of seeing Clark testify at trial, which is not always the case when grand jury testimony is admitted as substantive evidence in a criminal trial. *See United States v. Barlow*, 693 F.2d 954, 961 (6th Cir. 1982) (admitting the grand jury testimony of a witness who was unavailable to testify at trial). When testifying at Smith's trial, Clark insisted that he did not know the identity of the person who delivered the cocaine. Clark even accused the prosecutor of twisting his grand jury testimony and said: "You're putting two people's names together. I did not say Pops Bishop."

Clark's interpretation of his own grand jury testimony helped to put the testimony in context for the jury. Furthermore, Clark's willingness to verbally spar with the prosecutor at trial undercuts Smith's contention that Clark was a "young and impressionable witness" who was "spoon fed answers" during his grand jury appearance.

Finally, there was substantial additional evidence introduced at trial, including Smith's numerous recorded telephone calls to his coconspirators, upon which the jury could have properly based its guilty verdict. We therefore conclude

that the district court's error in failing to issue a cautionary instruction was harmless because "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 15 (1999) (finding that an improper jury instruction was a harmless error that did not require reversal of the conviction) (citation and quotation marks omitted); *see also United States v. Pugh*, 405 F.3d 390, 400 (6th Cir. 2005) ("In determining whether an error is harmless, the reviewing court must take account of what the error meant to the jury, not singled out and standing alone, but in relation to all else that happened.") (citation and quotation marks omitted).

C. The indictment

1. Reading the indictment to the jury

Smith also argues that the district court abused its discretion when it read the indictment against him and his codefendants to the jury. *See United States v. Scales*, 594 F.2d 558, 561-62 (6th Cir. 1979) (reviewing the district court's decision to read aloud and provide copies of the indictment to the jury for an abuse of discretion). Under normal circumstances, we have no doubt that a district court is well within its discretion in deciding to read an indictment to the jury. *See United States v. Maselli*, 534 F.2d 1197, 1202 (6th Cir. 1976) (observing that the practice of reading the indictment aloud helps to inform the jury of the charges against the defendant). In the present case, however, Smith contends that the reading of the indictment was improper because it repeatedly referred to Smith by the alias "Pops Bishop." Whether Smith in fact used this nickname was a contested issue at trial.

Smith, however, failed to contemporaneously object to the district court's reading of the indictment to the jury. His claim must therefore be analyzed under the plain-error standard

of review. *See Pugh*, 405 F.3d at 402 ("[F]or us to reverse the ruling of the district court, there must be error, which is plain, which affected the substantial rights of the appellant, and which 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'") (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997) (alternation in original)). At Smith's trial, an FBI agent testified that Smith admitted during an interview that people call him by the names "Pops" and "Bishop." The jury also heard evidence that the FBI had compared a voice exemplar taken from Smith with the voice of the man referred to as "Pops" and "Bishop" in the taped telephone calls, and determined that the man speaking on the tapes was Smith. Because there was significant evidence that Smith had used the nicknames "Pops" and "Bishop," Smith cannot show that his substantial rights were adversely affected by the district court's reading of the indictment to the jury.

2. Providing the deliberating jury with a copy of the indictment

The district court also furnished a copy of the indictment to the jury, and it did so without issuing a limiting instruction. Failure to instruct the jury "to the effect that the indictment is not to be considered evidence of the guilt of the accused" constitutes error. *Scales*, 594 F.2d at 561-62 (stating that "the rule is clear that the trial judge has discretion to submit the indictment to the jury in a criminal case," but only "as long as limiting instructions are given"); *see also United States v. Baker*, 418 F.2d 851, 852-53 (6th Cir. 1969) (per curiam) ("We conclude that it was an abuse of discretion for the trial court to permit these photostatic copies of a document possessing all of the indicia of a formal United States government document . . . to be handed to the jury without a proper explanation of the document and of the purpose of its delivery . . . .").

Smith did not timely object to the district court's failure

to offer a limiting instruction. He insists, however, that his claim should be evaluated under the abuse-of-discretion standard rather than the plain-error standard because of the "unique circumstances of this case." Specifically, Smith argues that, before the trial, his attorney brought a motion to strike the name "Pops Bishop" from the indictment. The district court denied the motion by stating that it was "much ado about nothing" because "in my courtroom, the Jury never sees the indictment." But in so ruling, the district court also said: "I have no present intent for the Jury to know that those words are in the indictment. No need to strike them necessarily. Maybe somewhere along the line you will convince me . . . ."

The record reveals that the district court did in fact change its position with respect to whether the jury should be provided with the indictment. At that time, however, Smith failed to raise an objection either to the indictment's use of the nicknames or the district court's failure to issue a limiting instruction to the jury. The decision of the district court to permit the jury to view the indictment must therefore be upheld unless Smith's substantial rights were affected. *See United States v. Darwich*, 337 F.3d 645, 655-56 (6th Cir. 2003) ("[F]ailure to raise an objection in the district court . . . limits appellate review to a plain error inquiry . . . ."). Because there was significant evidence that connected Smith with the name "Pops Bishop," Smith cannot show that providing a copy of the indictment to the jury constituted plain error. *See Baker*, 418 F.2d at 853 (finding that the defendant's constitutional rights were not affected where "the overwhelming weight of the evidence of guilt presented [made] it . . . clear beyond a reasonable doubt that neither a refusal to permit the jurors unlimited access to the[] copies of the indictment nor the offering of a proper contemporaneous instruction would have altered the verdict").

D. Sentencing issues

1. Enhancement on the basis of Smith's prior conviction

Smith further argues that the district court erred in sentencing him in accordance with the mandatory minimum sentence imposed by 21 U.S.C. §§ 841(b)(1)(A) and 851. Pursuant to these provisions, a person who possesses five kilograms or more of powder cocaine with the intent to distribute the cocaine must be sentenced to a statutory minimum of ten years in prison. The mandatory minimum sentence is doubled to twenty years, however, if the offender "commits such a violation after a prior conviction for a felony drug offense has become final." 21 U.S.C. § 841(b)(1)(A).

Smith had a prior conviction in Texas for possessing controlled substances with the intent to distribute. On this basis, the district court determined that it was required to impose the mandatory minimum sentence of 20 years. But Smith alleges that his prior conviction may not be used to enhance his sentence because the government failed to prove that Smith had "either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed," 21 U.S.C. § 851(a)(2), as it must do in order for his sentence to be enhanced. He concedes, however, that his argument is foreclosed by this court's decision in *United States v. Gaitan-Acevedo*, 148 F.3d 577, 594 (6th Cir. 1998) ("interpret[ing] the 'indictment or waiver' phrase to refer to the federal offense for which the mandatory sentence is imposed," and not to the prior conviction).

Smith raises the argument simply to preserve his objection for possible en banc rehearing or Supreme Court review. Because we are bound by our prior precedent, Smith's contention on this issue has no merit. *See Salmi v. Sec'y of*

Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the [published] decision of another panel.").

2. Enhancement for obstruction of justice

Finally, Smith argues that the district court violated his Sixth Amendment rights in sentencing him on the basis of judge-found facts. The district court applied a two-level enhancement to Smith's sentence after finding that he had obstructed justice by absconding during his trial and remaining a fugitive for 12 years. These facts were neither submitted to a jury nor admitted by Smith. This is a violation of Smith's Sixth Amendment rights as declared in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 749 (2005). *See also United States v. Oliver*, 397 F.3d 369, 380 (6th Cir. 2005) (holding that the Sixth Amendment is violated if a district court "impos[es] a more severe sentence that is supported by the jury verdict").

Under these circumstances, we would normally have to remand Smith's case for resentencing. *See United States v. Alva*, 405 F.3d 383, 385 (6th Cir. 2005) (remanding for resentencing where the district court "concluded that [the defendant] had obstructed justice, . . . a fact neither reflected in the jury verdict or admitted by [the defendant]"). The present case is unusual, however, because the district court was required to sentence Smith in accordance with the mandatory 20-year minimum dictated by 21 U.S.C. §§ 841(b)(1)(A) and 851. Smith was sentenced to 240 months (20 years) of imprisonment, and, if his case were remanded, the district court would not have the discretion to impose a shorter term of imprisonment. *See United States v. Johnson*, No. 03-6477, 2005 WL 1059276, at *5 (6th Cir. May 5, 2005) (unpublished) ("*Booker* does not apply when the defendant has been sentenced to the mandatory minimum."). We therefore conclude that a remand of Smith's case for resentencing is unnecessary.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX B

Case No: 04-1476

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARVIN SMITH

Defendant - Appellant

BEFORE: KENNEDY, CLAY, and GILMAN, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk